Fall 2018

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The Brazil Practice Newsletter of Quinn Emanuel Urquhart & Sullivan LLP

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Second Circuit Revisits The Extraterritorial Reach of the FCPA

The Foreign Corrupt Practices Act ("FCPA") was designed to make it unlawful for certain classes of persons and entities to make payments to foreign government officials to assist in obtaining or retaining business. The FCPA's anti-bribery provisions apply to all U.S. persons (also known under the statute as "domestic concerns"), certain foreign issuers of securities ("issuers"), and foreign firms and persons who cause, directly or through agents, an act in furtherance of such corrupt payments to take place within the United States. A recent decision of the United States Court of Appeals for the Second Circuit ("Second Circuit") narrowed the territorial reach of the statute for non-resident foreign nationals charged with conspiracy to violate the FCPA, thus dealing a blow to the U.S. Department of Justice's ("DOJ") expansive interpretation of the statute. *See Hoskings v. United States*, No. 16-1010-cr, 2018 WL 4038192 (2d Cir. Aug. 24, 2018).

The case centered around Lawrence Hoskings, a British national and former Alstom UK executive based in Paris, who was accused of conspiring with Alstom S.A. and a U.S. subsidiary to bribe Indonesian officials in exchange for securing a $118 million contract with the Indonesian government. Although Hoskings never worked for the U.S. entity, the DOJ charged him with (1) conspiring with the U.S. subsidiary to violate the FCPA and with aiding and abetting those violations, and (2) conspiring to violate the FCPA and aiding and abetting such violations while acting as an agent of the U.S. subsidiary.

In dismissing the first count of the indictment, the United States District Court for the District of Connecticut ("District Court") reasoned that, since Hoskins was not a "domestic concern" and had not committed any acts in furtherance of the scheme on

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INSIDE

Interview with Mike Carlinsky, Founder of Quinn Emanuel's Brazil Practice

Michael B. Carlinsky, a founder and managing partner of the firm's New York office and Brazil Practice, has consistently been ranked among the top litigators by multiple leading global publications. Chambers USA called Mr. Carlinsky "the Maserati of lawyers" and "'a master strategist' who is praised for his 'unique ability to see the big picture and craft and work toward results on a broad scale involving a huge constellation of matters.'" Mr. Carlinsky was also named one of the "Top 100 Trial Lawyers in America" by Benchmark Litigation. Mr. Carlinsky has recovered more than $4 billion dollars in verdicts, awards and settlements for his clients.

Q. How did the Brazil Practice come about?

A. Quinn Emanuel Urquhart & Sullivan ("Quinn Emanuel") has been focusing exclusively on the business of disputes since its founding in 1986. We now have over 800 lawyers spread across 22 offices around the world that only do litigation, arbitration, and investigations. We've handled some of the most important litigations and arbitrations around the world and have won 88% of the cases we've tried. So for us, catering to the Brazilian market—the largest in Latin America—was a no-brainer

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American soil, the DOJ could only charge Hoskins for conspiring to violate the FCPA under an agency theory. The DOJ filed an interlocutory appeal with the Second Circuit.

The Second Circuit held that Hoskins, as a non-U.S. national who was not on American soil and did not work for the U.S. subsidiary during the bribery scheme, could not be liable as a co-conspirator or accomplice of FCPA violations committed by others. After reviewing the statute's legislative history, the Court held that it was Congress' intent to "leave foreign nationals outside the FCPA when they do not act as agents, employees, directors, officers, or shareholders of an American issuer or domestic concern, and when they operate outside United States territory." *Id.*, at *93-94. The Second Circuit also relied on the presumption against the extraterritorial application of U.S. laws to individuals and entities located outside the United States. Because "the extraterritorial reach of an ancillary offense like aiding and abetting or conspiracy is coterminous with that of the underlying criminal statute" and given the Congressional intent to limit the statute's application to specific persons, *see supra*, the Court noted that the presumption against extraterritoriality therefore confined conspiracy and complicity liability to the specific terms of the statute.

The decision is significant in a number of respects. First, it rejects the DOJ's longstanding enforcement stance on conspiracy and accomplice liability. Indeed, the DOJ's own FCPA Resource Guide states that individuals and foreign companies could be liable for conspiring to violate the FCPA "even if they are not, or could not be, independently charged with a substantive FCPA violation." *Hoskins* clearly flies in the face of this guidance. Second, it provides non-U.S. persons an additional line of defense when facing potential FCPA charges. While the Second Circuit's ruling is not binding in other circuits, it could impact how other courts around the country interpret the FCPA and influence the DOJ's internal policy in this space.

(Interview with Mike Carlinsky continued from page 1)

and we've since become a "reference brand" in Brazil.

While the firm and its partners have represented Brazilian companies since its founding, the key moment for our Brazil Practice was our successful representation of Companhia Siderúrgica Nacional ("CSN"), a large Brazilian steel company, in a $500 million lawsuit against its former Chief Financial Officer in the United States District Court of the Southern District of New York for conversion and declaratory judgment relating to CSN's ownership interest in International Investment Fund. Although this was before *Lava Jato*, we realized that there was a demand for expert litigators that could deliver creative solutions to the problems faced by Brazilian companies. We set out to build a practice that focused on doing just that and have been very successful in our approach.

Q. How has the practice evolved?

A. Having established a solid reputation in representing Brazilian clients in litigations and arbitrations around the world, our practice evolved to represent some of Brazil's largest companies in regulatory matters related to the *Lava Jato*.

Our successful representation of the Special Committee of the Board of Directors of BTG Pactual S.A. ("BTG") in connection with the *Lava Jato* investigation highlighted our unique strengths in the white collar space. Our investigation into BTG and its officers, which involved the review of over 430,000 documents and dozens of interviews over a four-month period, found *no evidence* to conclude that allegations of misconduct and corruption against BTG or its former chief executive officer, André Esteves, were "credible, accurate or supported by reliable evidence."

We've since been retained to act in many of the largest and most important cross-border litigations and investigations arising out of the *Lava Jato*, including representing Odebrecht, JBS, J&F, OAS, and Sete Brasil. Our firm has deep experience with government investigations, including in matters against the Department of Justice ("DOJ") and the Securities Exchange Commission ("SEC"). In government-facing matters, experience as a prosecutor is important. Over 25 of our partners have served as United States Attorneys, Assistant United States Attorneys, Department of Justice attorneys, or as other high ranking government lawyers. They understand the dynamics of a prosecutor's charging decision. As a result, we have considerable expertise in designing and implementing strategies to avert criminal and regulatory charges.

Our White Collar Practice is co-led by William Burck, a former Special Counsel and Deputy Counsel to President George W. Bush in Washington, D.C., and a former federal prosecutor in New York City. Mr. Burck has been named for three consecutive years as

one of only a small handful of "White Collar MVP's" in the nation by *Law360*, an unprecedented achievement, as well "White Collar/Investigations/Enforcement Lawyer of the Year" for 2017 by *Benchmark Litigation*.

Our Brazil Practice also advises prominent businessmen and companies, including technology startups and litigation funders. Our practice is always evolving. Our team also includes a partner who has lived in Brazil (Stephen Wood) and a permanent U.S. associate (Lucas Bento) who is a dual citizen of Brazil and the U.S. Every year we hire Brazilian lawyers from top Brazilian firms and companies to work in our U.S. offices. This enhances our ability to further understand the needs of our clients and better meet their objectives.

Q. What have been the highlights of the practice thus far?

A. It is well-known that the *Lava Jato* has presented a number of challenges for Brazilian and international companies operating in Brazil and abroad. Many of our largest representations and victories have been extensively covered by the legal and business press. But for us what matters is our ability to achieve victories and resolutions that help clients continue focusing on what matters to them the most: building their business.

Q. Quinn Emanuel has 22 offices spread across 4 continents, but none in Brazil. How do you work on some of the most important cases involving Brazil without maintaining an office there?

A. Our firm has over the years worked with different law firms in Brazil. Many of the cases we handle for Brazilian clients or clients with interests in Brazil will typically require a significant collaboration with a Brazilian law firm. So we're not in the Brazilian market to compete with Brazilian law firms – rather, our approach focuses on building mutually beneficial relationships with Brazilian law firms so that *together* we can deliver outstanding services to our clients. Whether it's for an international litigation, arbitration, or internal investigation, our firm is constantly working with Brazilian lawyers and have as a result developed great friendships with them.

Our attorneys also visit Brazil regularly to meet with Brazilian companies and business leaders. We have held many events in Brazil, including our popular "Demystifying the U.S. Jury Trial" Program in Sao Paulo and Rio de Janeiro, which demonstrates U.S. litigation procedures through a U.S.-style mock jury trial.

Q. If you could say one thing about the litigation and regulatory environment in the U.S. to Brazilian companies or business people, what would it be?

A. What happens in Brazil doesn't stay in Brazil. There are all sorts of U.S. repercussions to what may seem an exclusively domestic situation. Brazilian executives and lawyers are some of the most sophisticated in the world. They understand that what they or their clients do in Brazil may be noticed by U.S. regulators and other U.S. stakeholders, including lenders and investors. Having the right team by your side to navigate through what may or may not be a problem in the U.S. is critical to the success of your business.

Conversely, the U.S. legal system can be wielded as a very powerful tool to achieve one's business objectives. We can help clients and local counsel better understand this tool and how it can be used to achieve great competitive advantage. Q

Crystal Ball: Are BNDES Loans and Healthcare Next?

Industry sweeps are a classic enforcement tool employed by regulatory agencies around the world. In an industry sweep, a regulator—such as the U.S. Securities and Exchange Commission or the Comissão de Valores in Brazil—or a public authority—such as the U.S. Department of Justice or Ministério Público Federal in Brazil—investigates misconduct at multiple companies within a particular industry. As DOJ foreign bribery chief Dan Kahnnoted noted recently: "When you lift up a rock and find something, you tend to find it in multiple companies [of an industry]." Global Investigation Review, June 19, 2018, available at https://tinyurl.com/y78ol438.

It's been over four years since *Lava Jato* began, and the investigation has expanded beyond the natural resources sector. Plea bargains and leniency agreements revealed further misconduct in other sectors, including toll road operators and other public service concessionaires. Other investigations proceeded in parallel with the *Lava Jato*, such as *Operação Zelotes*, which investigates allegations that companies—including Brazilian subsidiaries of multinational companies—bribed administrative judges to secure tax benefits in Brazil. *Operação Carne Fraca* has focused on alleged misconduct in the meat processing industry. And there is no indication that this Brazilian crackdown on corruption will slow any time soon.

Two areas appear to be strong candidates for future investigations. The first is the Brazilian state development bank, BNDES. Already the subject of *Operação Bullish*, which has uncovered corruption in the approval and disbursement of BNDES loans to private sector companies, the practices of senior BNDES officials and politicians with oversight of BNDES are likely to be a prime target for Brazilian and U.S. investigators. The amount of money disbursed by BNDES is massive: from 2010 to 2017, BNDES loaned at least R$ 1.1 trillion, with R$ 168 billion in 2010 alone. The recipients of these loans span a wide range of industries, including utilities, car manufacturers, and pharmaceutical companies. The new President-elect Jair Bolsonaro has vowed to "open up the black box" of BNDES loans and further investigate irregularities. It's only a matter of time before investigators focus on recipients of BNDES funds.

Companies in the healthcare industry also appear to be at risk of a crackdown. The healthcare sector is particularly at risk for corruption (and multi-jurisdictional investigations) because multinational companies often use distributors to supply their Brazilian clients—and overseeing them is no easy task. Moreover, the Brazilian Government is the largest purchaser of healthcare products in Brazil through the Unified Health System. In July 2017, a joint investigation among Brazilian antitrust authority CADE, the MPF, and Brazilian federal police called *Operação Ressonância* began to investigate cartel activity among major multinational players involving the supply of pacemakers and other special medical devices. That same year, medical device company Orthofix International N.V. entered into resolutions with the DOJ and the SEC relating to its Brazilian subsidiary's participation in a kickback scheme with doctors at government-owned hospitals. Around the same time, authorities raided Alexion Pharmaceuticals' offices in São Paulo as part of an investigation into collusion with patient association AFAG and its lawyers in connection with fraudulent lawsuits designed to compel Brazil's public healthcare system to acquire Alexion's products.

These developments could be a preview of future investigations and enforcement actions in the United States.

Arbitration Update: Quinn Emanuel Scores $622 Million Victory for Vantage Drilling Against Petrobras

Quinn Emanuel represents Vantage Deepwater Company and Vantage Deepwater Drilling, Inc. (together, "Vantage") in a dispute with Petrobras over a deepwater drilling services contract. Pursuant to the contract, Vantage was to perform deepwater drilling services for Petrobras over an eight year period. Less than three years into the term, however, Petrobras terminated the contract. Vantage filed a demand for arbitration in Houston, Texas with the International Center for Dispute Resolution of the American Arbitration Association. Vantage sought benefit of the bargain damages for the portion of the contract's eight year term that Petrobras wrongfully terminated. On June 29, 2018, following a hearing on the merits, the arbitral tribunal awarded Vantage $622 million with post-award interest of 15.2% compounded monthly.

On July 2, 2018, Vantage petitioned the United States District Court for the Southern District of Texas to confirm the arbitral award. Those proceedings are ongoing. On August 27, 2018, Vantage successfully attached certain Petrobras assets in the Netherlands to protect Vantage's financial interests while it seeks to fulfill the arbitral award.

Three Things Brazilian Lawyers Should Know About The U.S. Legal System

Those accustomed to litigation and dispute resolution in Brazil understandably find certain aspects of the U.S. legal system confusing. Three topics that often surprise Brazilian litigants are: (1) the expansive jurisdiction that U.S. regulators have under U.S. law; (2) the breadth of discovery and disclosure in civil litigation; and (3) the ability to request evidence in the U.S. for use in foreign proceedings.

First, under U.S. law the power of the U.S. Department of Justice ("DOJ") to investigate and prosecute crimes extends far beyond its territorial borders. Simply put, if a crime involves the transfer of U.S. Dollars, the DOJ is likely to take the position that it has the power to investigate and potentially prosecute those involved, even if the transfer originated in a foreign account and ended in a foreign account. The reason for this is that any significant U.S. Dollar transfer typically requires the use of correspondent

bank accounts located in the United States. So when a non-U.S. bank executes a client's request to transfer U.S. Dollars to a customer at another non-U.S. bank, the chain of transactions required to complete the transfer typically involves transfers between U.S. accounts held by those Brazilian banks at U.S. financial institutions. Under U.S. law, however, the momentary U.S. layover of the funds is enough for U.S. prosecutors to investigate and potentially prosecute. As a result, any use of U.S. Dollars in the course of potentially improper conduct—even indirectly, including via unofficial money changers—subjects foreign nationals to U.S. criminal and regulatory exposure.

Second, the U.S. legal system provides for more extensive production of evidence mechanisms—known in the U.S. as "discovery"—than most other jurisdictions around the world. The U.S. Federal Rules of Civil Procedure ("FRCP") provides litigants extensive powers to request and compel disclosure of evidence, including pre-trial admissions of facts and answers to allegations, from each other and, to a lesser extent, from third parties who are strangers to the suit. Moreover, the discovery process is largely conducted directly between the parties. Although courts ultimately supervise and police the process, including by quashing requests that are unduly burdensome or clearly irrelevant, the parties have broad powers to discover one other's sensitive personal and business information and use it against each other in the litigation. This presents a stark contrast to Brazilian litigation, where the parties have considerable discretion to select the document they wish to disclose to the adversary.

Third, U.S. federal law allows an interested party to a foreign proceeding (such as a foreign plaintiff or defendant in a Brazilian litigation) to obtain discovery in the U.S. for use in that foreign proceeding. Specifically, 28 U.S.C § 1782(a) provides as follows:

"The district [i.e., federal trial] court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal."

A Section 1782 application can be a powerful tool for parties involved in foreign proceedings who wish to take advantage of the broad approach to discovery adopted by U.S. federal courts to obtain evidence (*i.e.*, documents and/or deposition testimony) that they are otherwise unable to obtain in the foreign proceedings.

As the largest business litigation firm in the world, Quinn Emanuel has extensive experience navigating the harsh realities of U.S. criminal and regulatory law and using the civil discovery process to our clients' benefit. We look forward to assisting you achieve your objectives.

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